

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-85:

HAROLD "SLIM" CAMPBELL,
Columbus, Montana,

Complainant,

- vs -

COUNTY OF STILLWATER,
Columbus, Montana,

Defendants.

FINAL ORDER

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on October 9, 1985 by Hearing Examiner Linda Skaar;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 5th day of December, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Jacobson
Alan L. Jacobson
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 6th day of December, 1985:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS
IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #2-85

HAROLD "SLIM" CAMPBELL
Columbus, Montana

Complainant,

-vs-

COUNTY OF STILLWATER
Columbus, Montana

Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW
RECOMMENDED ORDER

* * * * *

On January 14, 1985, Harold "Slim" Campbell filed charges against Stillwater County. An Employee of the Road Department, Mr. Campbell alleged that he was laid-off from his employment because he circulated information about collective bargaining among the crew in the Road Department, and by so doing, Stillwater County violated Sections 39-31-401 (1)-(4) MCA.

A hearing was held in Columbus, Montana on May 21, 1985, under the authority of Title 29, Chapter 31 and in accordance with the Administrative Procedures Act, Title 2, Chapter 4, MCA. Mr. Campbell was represented by Jerrold L. Nye of Nye and Meyer, Billings, Montana and Stillwater County was represented by County Attorney C. Ed Laws.

After careful review of testimony and evidence presented at the hearing, I make the following findings of fact:

FINDINGS OF FACT

1. Harold E. "Slim" Campbell went to work for the Stillwater County Road Department on July 1, 1982. He is a good employee and the best welder in the department. Mr. Campbell has done many things in his tenure with the department including operating equipment, repairing machinery and welding. Immediately prior to being laid-off in January, 1985, he was working in the shop welding and doing repair work.

1 2. Stillwater County employees have been covered by
2 the same health insurance policy for several years. Road
3 and Bridge Department employees have not been alone in their
4 dissatisfaction with the insurance coverage. This dissatis-
5 faction came to a head after a meeting with the insurance
6 company representative the latter half of 1984. At this
7 meeting the insurance representative informed the crew that
8 in order for a claim for hospitalization insurance to be
9 paid, the claimant would have to notify the insurance
10 company prior to his admission to the hospital.

11 3. In response to the concern with the insurance,
12 Slim Campbell's wife phoned the Board of Personnel Appeals.
13 Subsequently, the Campbell's received a copy of the Public
14 Employees Collective Bargaining Act and a copy of the Board
15 rules. During the first part of December, 1984, Mr.
16 Campbell started circulating these documents among the road
17 crew. There was no attempt to keep secret the existence of
18 these "papers". The documents were kept in a brown envelope
19 and lay on the lunch table during the day. Discussions of
20 their rights and the pros and cons of organizing took place
21 during coffee breaks. Unions were not a new subject among
22 the men. Conversations about unions had occurred sporad-
23 ically over the years. Many of the men were frightened of
24 organizing because an attempt to organize several years
25 previously had resulted in retaliation against the group
26 leader. It appears that those favoring organization wanted
27 an independent local organization and were against affili-
28 ating with an established union.

29 While County Road Boss Duane Christiansen did not look
30 in the brown envelope, he was aware of its existence and
31 aware of the talk of organizing among the men. During
32 December several of the men sought him out to discuss the
situation. Three men of varying views on unions and organ-

1 ization went in to talk to Christiansen. These men couched
2 their conversation in terms of "the brown envelope". One
3 was very negative about unions, one was anti-union but "this
4 wasn't a union" and the third was mainly concerned about the
5 insurance problem. During these conversations an exchange
6 of views on the consequences of unionizing and possible job
7 classification took place.

8 As a result of these conversations and general dis-
9 cussion among the men, Slim Campbell also sought out Duane
10 Christiansen. He told Mr. Christiansen that they were "just
11 checking out their rights" and were not bringing in a union.
12 During their exchange of views about the consequence of
13 organizing the subject of job classification again came up.
14 Campbell interpreted Christiansen's view as a threat: if
15 organized, the men would be assigned specific equipment,
16 there would be a full-time mechanic and if the equipment
17 broke down the men would be laid-off while it was being
18 repaired. Although interpreting this as a threat, Mr.
19 Campbell did not feel that he was being picked on specif-
20 ically.

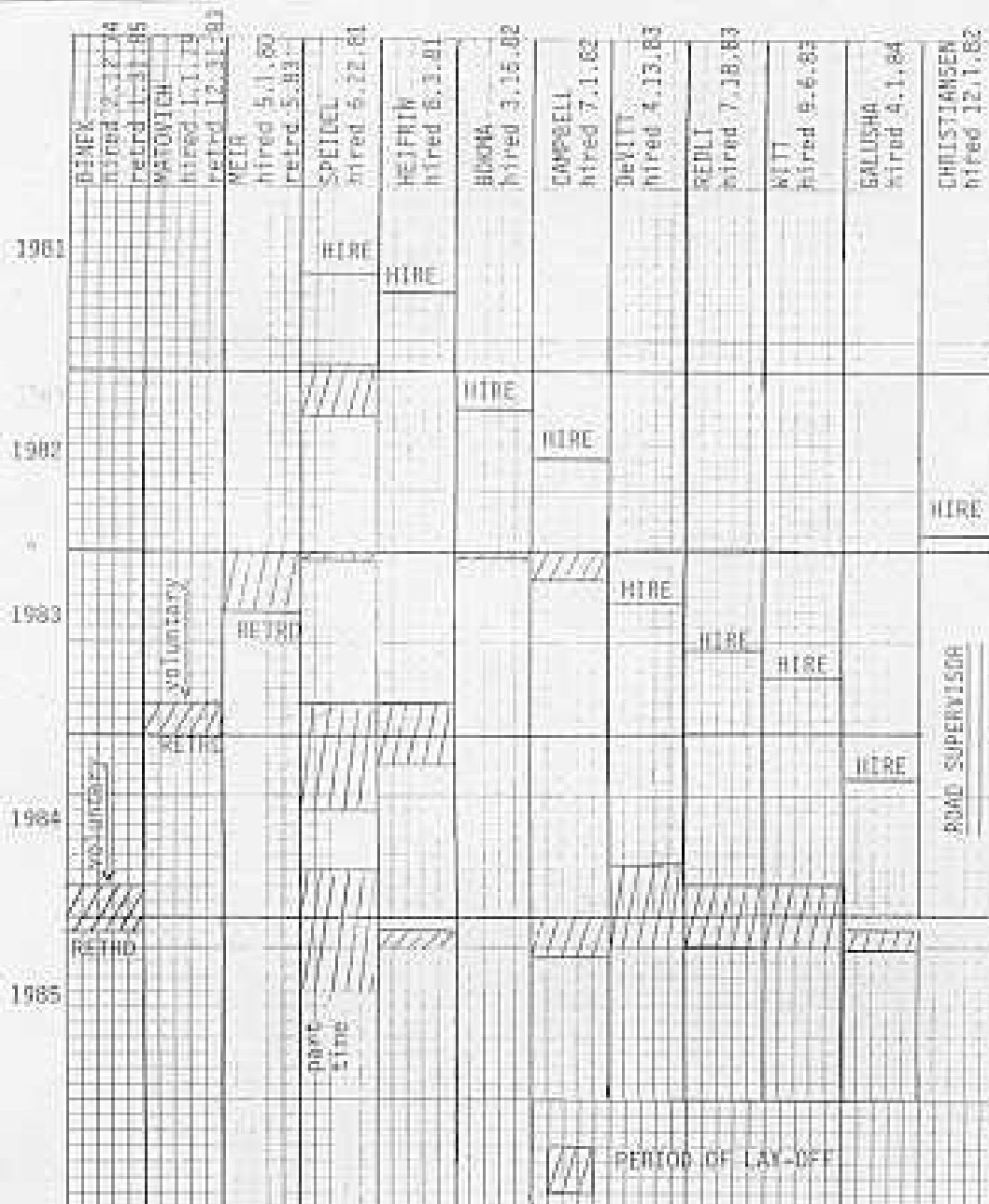
21 In each instance the men initiated the conversation
22 with Christiansen. Christiansen testified that he had
23 worked around unions before and knew the laws--that he was
24 not to sway one way or the other.

25 4. On January 2, 1985, Duane Christiansen notified
26 Slim Campbell that he would be laid-off effective January 5,
27 1985 due to budget restraints.

28 5. Employee Raymond Sund testified that he did not
29 know why Campbell was laid-off but he thought that it was
30 because of the organizing activities. Employee, Charles
31 Fowler, had a similar perception.

32 6. There were very few lay-offs in the Road Depart-
 ment before Duane Christiansen became supervisor on December
 1, 1982. Mr. Christiansen has instituted no formal lay-off

policy but he likes to lay-off according to seniority. However, he also considers which workers he will need for specific jobs. In 1983, Campbell and three newly hired workers were kept on while three men senior to Campbell were laid-off. In 1984-85, all but one of the men with less seniority than Campbell were laid-off before Campbell. In addition, lay-off of two more senior men preceded Campbell's lay-off. The periods of lay-off can be discerned from the following table:



1 7. Lay-offs for the 1984-85 winter season began
2 toward the end of September with the lay-off of DeVitt
3 (8/27/84). This was followed by the lay-off of Clarence
4 Spaidel (9/30/84) and Witt, Binek and Redli (10/31/84).
5 Slim Campbell was the next person to be laid-off on January
6 5, 1985 and his lay-off was followed by that of Ed Heifrin
7 and Wayne Galusha (1/31/85). See the table above for dates
8 of hire.

9 Although less senior than Campbell, Galusha was kept on
10 longer so that he could become more familiar with snow
11 plowing in the Rapelje area. Galusha had been hired specif-
12 ically to be in charge of the Rapelje area when the man
13 presently working that area retires.

14 8. Slim Campbell and the other men who were laid-off
15 during the 1984-85 season were laid-off for budgetary
16 reasons. The end of every month, as supervisor of the Road
17 Department, Mr. Christiansen receives a computer print-out
18 showing the status of his budget. The print-out for
19 November showed 46% of the money budgeted for wages and
20 salaries had been spent in the Road Fund and 49% had been
21 spent in the Bridge Fund, but only 42% of the year had
22 elapsed. After 50% of the time had elapsed at the end of
23 December, the budget was still out of balance as far as
24 salaries were concerned. Fifty-three percent of the money
25 had been spent from the Road Fund and 55% from the Bridge
26 Fund. It was in response to this imbalance that Campbell
27 was laid-off effective January 5, 1985.

28 9. During the winter of 1984-85 while all of the men
29 were still on lay-off, two individuals were hired in the
30 Road department. There were unusual circumstances sur-
31 rounding each person. One was sentenced by the Judge to do
32 45 days public service work. This individual turned out to
a good worker and he was kept on in a work program after his

1 sentence expired. Under the work program, Stillwater County
2 paid only 50% of the person's wages. The second person was
3 hired at the request of the county Welfare Department. His
4 family was receiving public assistance and he was hired on
5 at the Road Department to help alleviate the financial
6 burden on the welfare budget. This person was not depend-
7 able, worked only sporadically and finally disappeared.

8 10. On Thursday, March 14, 1985, an article appeared
9 in The Stillwater County Sun reporting the Board of Per-
10 sonnel Appeals finding of "probable merit" in the charge
11 filed by Mr. Campbell. This article appeared after the rest
12 of the crew of the Road Department had been recalled to
13 work. Within a day or two after the newspaper article
14 appeared, Slim Campbell was recalled to report to work on
15 Tuesday, March 19, 1985. Mr. Campbell's recall was delayed
16 because of the charge he had filed with the Board of Per-
17 sonnel Appeals. Duane Christiansen testified that he had
18 intended to recall Slim Campbell at the same time he re-
19 called the rest of the men (about March 1, 1985) but wanted
20 to consult the County Attorney to see if this was appro-
21 priate. His initial attempt to contact County Attorney Ed
22 Laws failed and he did not get around to contacting him
23 again until just before Campbell was recalled. Christiansen
24 testified that the newspaper article had nothing to do with
25 Campbell being recalled.

26 DISCUSSION

27 As an employee of the Stillwater County Road Depart-
28 ment, Slim Campbell is a public employee and is entitled to
29 the protection of the Montana Public Employees Collective
30 Bargaining Act. Section 19-31-201 MCA states

31 19-31-201. Public employees protected in
32 right of self-organization. Public employees
shall have and shall be protected in the
exercise of the right of self-organization,
to form, join, or assist any labor organ-
ization; to bargain collectively through

1 representatives of their own choosing on
2 questions of wages, hours, fringe benefits,
3 and other conditions of employment, and to
4 engage in other concerted activities for the
5 purpose of collective bargaining or other
6 mutual aid or protection free from inter-
7 ference, restraint, or coercion.

8 Section 39-31-401 makes it an unfair labor practice for
9 an employer to violate rights granted to employees in
10 Section 201.

11 39-31-401. Unfair labor practices of public
12 employer. It is an unfair labor practice for
13 a public employer to:

14 (1) interfere with, restrain, or coerce
15 employees in the exercise of the rights
16 guaranteed in 39-31-201;

17 (2) dominate, interfere, or assist in the
18 formation or administration of any labor
19 organization; however, subject to rules
20 adopted by the board under 39-31-104, an
21 employer is not prohibited from permitting
22 employees to confer with him during working
23 hours without loss of time or pay;

24 (3) discriminate in regard to hire or tenure
25 of employment or any term or condition of
26 employment in order to encourage or dis-
27 courage membership in any labor organization;
28 however, nothing in this chapter or in any
29 other statute of this state precludes a
30 public employer from making an agreement with
31 an exclusive representative to require, as a
32 condition of employment, that an employee who
33 is not or does not become a union member,
34 must have an amount equal to the union
35 initiation fee and monthly dues deducted from
36 his wages in the same manner as check off of
37 union dues;

38 (4) discharge or otherwise discriminate
39 against an employee because he has signed or
40 filed an affidavit, petition, or complaint
41 or given any information or testimony under
42 this chapter; or

43 (5) refuse to bargain collectively in good
44 faith with an exclusive representative.

45 Because of the similarity between the Montana Public
46 Employees Collective Bargaining Act and the National Labor
47 Relations Act, the Montana Board of Personnel Appeals has
48 long looked to decisions of the National Labor Relations
49 Board and the federal courts for guidance in interpreting
50 the Montana Act. In this particular instance, the simi-
51 larity is between Sections 7 and 8 of the NLRA and Sections
52 39-31-201 and 39-31-401 MCA.

1 The first determination we must make is whether Slim
2 Campbell's activities were protected activities within the
3 meaning of Section 201. Slim Campbell was admittedly taking
4 the lead into looking into the employees' rights under the
5 collective bargaining act and circulating the materials
6 supplied by the Board of Personnel Appeals. That he was the
7 leader of the activities which might have led to the organ-
8 ization of the employees in the shop is undisputed. The
9 courts have long held that concerted activities within the
10 meaning of Section 7 of the NLRA (the same as Section 201
11 MCA) are not limited to union activities. Concerted act-
12 ivity may take place where one person is seeking to induce
13 action from a group for their mutual aid and protection.
14 Salt River Valley Water Users Association v. NLRB, CA 9
15 (1953) 206 F2d 125, 32 LRHM 2598. For example, organizing a
16 group to meet with the county commissioners to discuss
17 insurance coverage would be a protected activity under the
18 meaning of Section 7 or Section 201. A conversation may
19 constitute concerted activity even if it involves only a
20 speaker and a listener. "[P]reliminary discussions are
21 [not] disqualified as concerted activities merely because
22 they have not resulted in organized action or in positive
23 steps toward presenting demands. We recognize the validity
24 of the argument that, inasmuch as almost any concerted
25 activity for mutual aid and protection has to start with
26 some kind of communication between individuals, it would
27 come very near to nullifying the rights of organization and
28 collective bargaining guaranteed by Section 7 of the Act, if
29 such communications are denied protection because of lack of
30 fruition. Mushroom Transportation Co. v. NLRB, C A 3
31 (Philadelphia) 330 F2d 606, 56 LRHM 2034 (1964).

32 Thus we can conclude that Slim Campbell's activities,
even though they were not fruitful, were protected

1 activities within the meaning of Section 39-31-201 MCA.
2 After reaching this conclusion, we next turn to the meat of
3 Campbell's charge. In laying Campbell off, did the county
4 interfere with, restrain or coerce him in the exercise of
5 his rights guaranteed in Section 201 or did it discriminate
6 in regard to hire or tenure of employment or any term or
7 condition of employment in order to encourage or discourage
8 membership in any labor organization? In Great Dane
9 Trailers, the U.S. Supreme Court outlined important
10 principles to be applied to alleged violations of Section
11 8(a)(1) and (3) of the Act (Sections 39-31-401(1) and (3)
12 MCA). "First, if the employer's conduct was 'inherently
13 destructive' of important employee rights, no proof of
14 antiunion motivation is needed and the Board can find an
15 unfair labor practice even if the employer introduces
16 evidence that the conduct was motivated by business
17 considerations. Second, if the adverse effect of the
18 discriminatory conduct on employee rights is 'comparatively
19 slight,' an antiunion motivation must be proved to sustain
20 the charge if the employer has come forward with evidence of
21 legitimate and substantial business justification for the
22 conduct." "Thus, in either situation, once it has been
23 proved that the employer engaged in discriminatory conduct
24 which could have adversely affected employee rights to some
25 extent, the burden is upon the employer to establish that it
26 was motivated by legitimate objectives since proof of
27 motivation is most accessible to him." NLRB v. Great Dane
28 Trailers, Inc. 388 US 26, 65 LRM 2469.

29 Analyzing the facts in this case in the light of these
30 principles, we find that Slim Campbell was laid-off from his
31 job approximately one month before an employee less senior
32 than he. If the employees had been laid-off in order of
strict seniority, Wayne Galusha would have been laid-off the

1 first week in January and Slim Campbell would have been kept
2 on until the end of January and then laid off. How much
3 greater the effect of a lay-off the first week in January
4 versus a lay-off the end of January had on employee organ-
5 izational rights is speculative. Lay-offs will always have
6 some affect on organizational campaigns but all lay-offs are
7 not proscribed by the Act. In this case we must conclude
8 that the employer's conduct in laying Campbell off could
9 have adversely affected employee rights to some extent.
10 Reaching this conclusion we can then apply the remainder of
11 the Supreme Court's second test. The burden is on the
12 County to prove that in laying Slim Campbell off it was
13 motivated by legitimate business objectives. The County
14 successfully proved that budget considerations caused all
15 the lay-offs in the winter of 1984-85. Although Slim
16 Campbell was laid-off before an employee less senior than
17 he, the County had not laid-off by strict seniority in the
18 past. In fact, in the winter of 1983-84, Campbell was kept
19 on through the winter while more senior men were laid-off.
20 In addition, to the employer proving a legitimate business
21 objective, the plaintiff has also failed to meet the burden
22 of proof on the question of anti-union motivation. Thus, we
23 must conclude that the evidence on the record fails to
24 sustain Slim Campbell's charge that he was laid-off because
25 he was exercising his rights under Section 39-31-201 MCA.

26 Slim Campbell's charge was filed shortly after he was
27 laid-off on January 5, 1985 and we cannot extrapolate it to
28 cover his call-back to employment even though it is clear
29 that Christiansen did not call Campbell back to work as soon
30 as other employees because of the charge he had filed with
31 this Board. This is clearly a violation of 39-31-401(4) and
32 had the charge been made we would have found in Campbell's
favor. This situation, along with past history, will

1 certainly color any future organizational attempts by
2 employees in Stillwater County. Employees rights under the
3 Montana Public Employees Collective Bargaining Act are broad
4 and it will behoove the County Commissioners to see that all
5 their supervisors are knowledgeable of employee rights and
6 are careful not to abridge these rights.

7 CONCLUSION OF LAW

8 Stillwater County is not in violation of 19-31-401
9 (1)-(4) MCA.

10 RECOMMENDED ORDER

11 The charge in ULP 2-85 is hereby dismissed.

12 NOTICE

13 Written exceptions to these Findings of Fact, Con-
14 clusions of Law and Recommended Order may be filed within
15 twenty days. If no exceptions are filed with the Board of
16 Personnel Appeals within that time, the Recommended Order
17 shall become the Order of the Board. Exceptions shall be
18 addressed to the Board of Personnel Appeals, Capitol Sta-
19 tion, Helena, MT 59620.

20 Dated this 17th day of October,
21 1985.

22 BOARD OF PERSONNEL APPEALS

23
24 By Linda Skarr
25 LINDA SKARR
26 Hearing Examiner
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